Defamation of Justice – Propositions on how to evaluate public attacks against the Judiciary

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Public debate is an essential element of a democratic society. While this debate should not spare the judiciary, public attacks against the judiciary of a critical intensity can be observed in several European countries. The most recent example originates from Poland, where, in September 2017, a campaign on bill boards and on the internet was launched in support of the controversial draft acts on judicial reform. The campaign portrays judges as a "privileged cast" and as being corrupt, criminal and incompetent. Having regard to these events, it should be borne in mind that attacks against the judiciary from members of the legislative and executive can pose real threats to judicial independence and the separation of powers. This post takes these considerations as the starting point for a general discussion on how to properly evaluate public criticism of the judiciary. We suggest a frame of reference which seeks to balance the right of free speech and the legitimate interest of the judiciary to not have its legitimacy and independence abridged by political actors. In this regard, we argue that the level of scrutiny must depend on where such criticism comes from.

I. Examples of public attacks against the judiciary

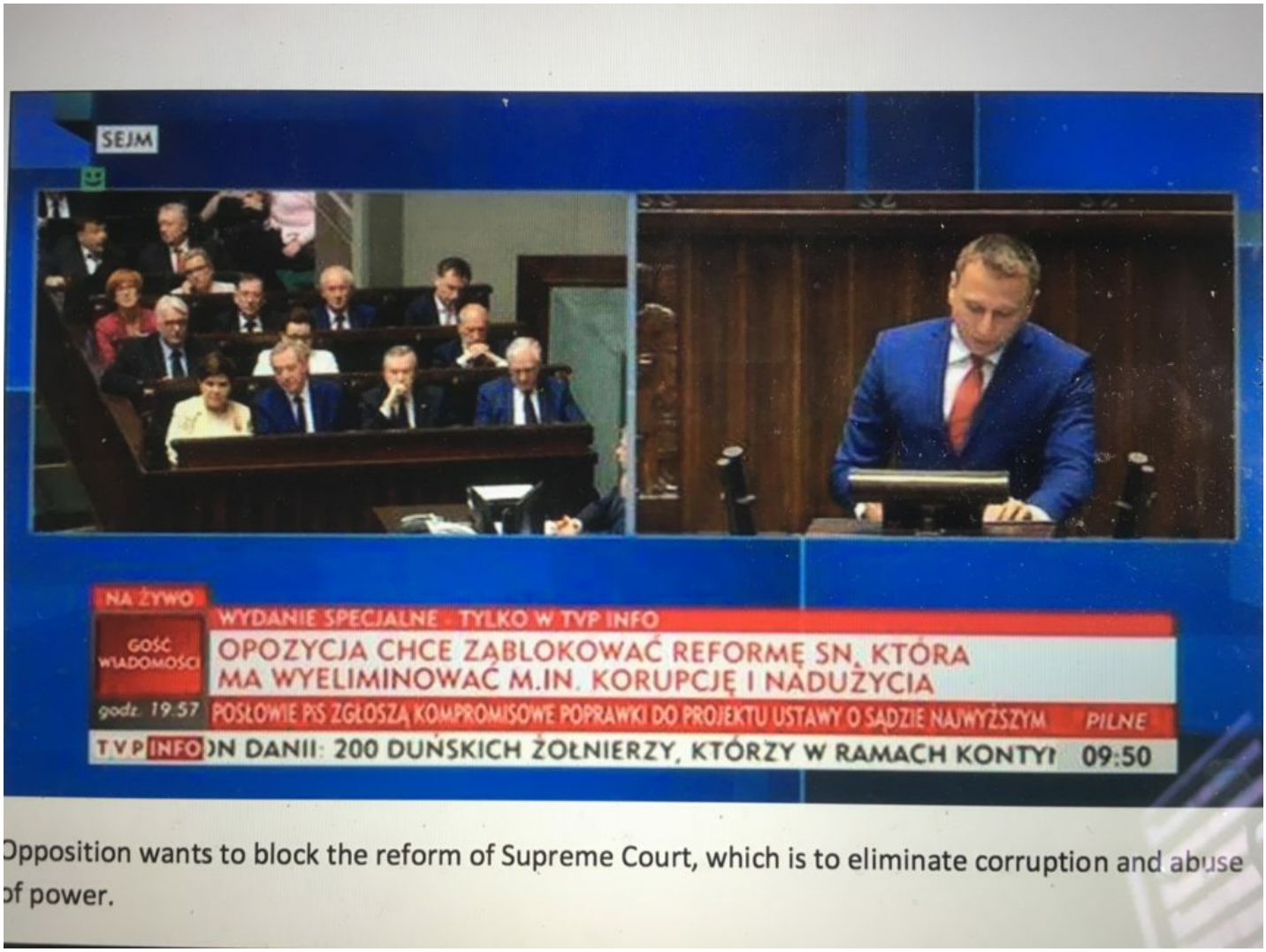
A special form of public criticism of the judiciary can be witnessed in Poland in the context of the reforms of the Polish judiciary. In the summer of 2017, the Sejm voted on three draft acts concerning the judiciary: One on the National Council for the judiciary, one on the organization of courts and one on the Supreme Court. All three draft acts were met with heavy national and international criticism. For the following descriptions, we rely on the account given by the Polish judges Dariusz Mazur, member of the judge's association 'Thermis' and Waldemar Zurek, the spokesman of the Polish National Council for the judiciary, which can be accessed here:

By September 8th, an ad-campaign was launched on the Internet, on large billboards and on TV by the so-called "Polish National Foundation", which was established by the current Sejm and is financed by 17 state-owned companies. The official goal of the PR-campaign is to promote the reforms of the judiciary inside of Poland. While there are problems in the Polish judiciary, as for example the long duration of court procedures, the campaign does not address the reasons for these problems (according to the judges' association 'Iustitia', as much as 517 posts are vacant in the Polish judiciary). Rather, the campaign portrays the judiciary and judges in general in a negative way. The billboards are designed in black and white. One board, for example, shows on the left side, in white letters on black ground the words: "That's how it is: Judges about themselves: An extraordinary caste." below that, in small print: "It is time that this changes" and on the right, white side, in black letters it is written: "That's how it should be: judges are responsible like other citizens when they break the law."

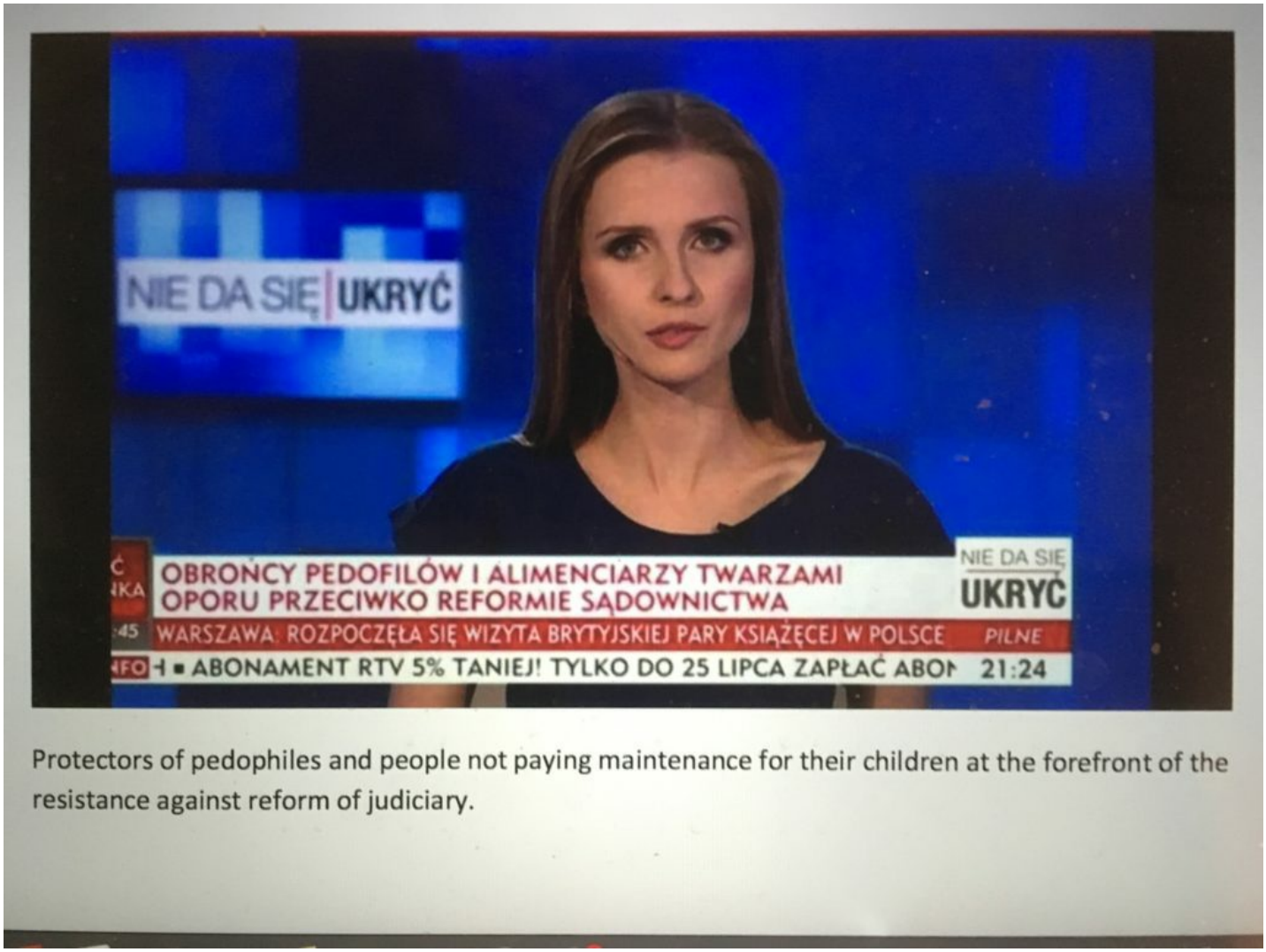
(picture: Dariusz Masur)

The campaign also produces a distorting mirror image of the Polish judiciary by describing – in quite a tendentious way – disciplinary proceedings against judges and by admonishing real or alleged errors of justice. To prove its point, the campaign refers, for example to a case of a judge who stole trousers. It fails to mention, however, that the judge was retired and – more importantly – mentally ill.

The government and the governing Law and Justice Party deny any involvement in the campaign. However, Prime Minister Beata Szydło was present at the official inauguration of the campaign and the campaign itself was registered and is run, apparently, by two former employees of the chancellery of the Prime Minister. Further, their financial resources are provided by state-owned companies whose managers have all been nominated by the Law and Justice Party. The campaign also fits right into the narrative of the government that publicly stated that the judiciary must be “given back to the Polish people” – a message also replayed on state-owned television channels, where “protectors of pedophiles and people who are not paying maintenance for their children” are claimed to be “at the forefront of the resistance against the reform of the judiciary” and where only the reform proposed by the government can “eliminate corruption and the abuse of power” in the judiciary.



Opposition wants to block the reform of Supreme Court, which is to eliminate corruption and abuse of power.



Protectors of pedophiles and people not paying maintenance for their children at the forefront of the resistance against reform of judiciary.

Even if the Polish example is particularly worrying, public criticism of judicial decisions – especially by politicians – is neither a novel phenomenon nor limited to Poland. US-President Thomas Jefferson was among the most outspoken critics of the Supreme Court Judgment in the case of "Marbury vs. Madison". More recently, the Hungarian foreign minister, Péter Szijjártó, has called the judgment of the European Court of Justice ('ECJ') in joined cases C643/15 and C647/15 concerning the refugee quota, among other things, "appalling and irresponsible". US-President Donald Trump publicly questioned the qualification and legitimacy of a "so called judge". The floor leader of the German far-right party AfD in the Bundestag, Alice Weidel, has recently tweeted about the "insane judges at the ECJ", while criticizing a judgment from the European Court of Human Rights (ECtHR), thereby not only personally insulting judges but also getting the most basic facts wrong. In November 2016, after a three judge panel of the High Court of Justice for England and Wales decided that Article 50 TEU could only be triggered after an Act of Parliament, the Daily Mail opened with a photograph of the judges and the headline "ENEMIES OF THE PEOPLE".

II. Public debate and the judiciary – Defining the problem

Public debate is an essential element of a democratic society. In principle, the judiciary and decisions and actions of judges and prosecutors are not and must not be exempt from public scrutiny. However, there is a fine line between freedom of expression and legitimate criticism on the one hand, and disrespect and undue pressure on the other. The specific tasks of the judiciary in democracies under the rule of law require public confidence in and respect for the judiciary. If unfounded public criticism reaches a certain degree, the pillar of trust on which the judicial system is built, can crumble. It is especially worrying if representatives of other branches of government criticize and try to delegitimize the judiciary. In a state build on the rule of law, it is sensibly the task and raison d'être of an independent judiciary to also reach – within its competences – politically unpopular decisions, that cannot depend on what politicians or the majority want or desire. Unfounded, defamatory or insulting criticism by other state powers therefore negates this important function of an independent judiciary. It

is therefore not surprising, that strong public criticism is used in different European countries as part of the "toolbox" of political forces that wish to limit judicial independence and delegitimize the judiciary (see for examples: CCJE, CCPE "Challenges for judicial independence and impartiality in the member states of the Council of Europe" SGInf(2016)3, at paras. 260 – 283).

III. Ideas for a frame of reference to evaluate public criticism of the judiciary

While most of the criticisms depicted above may seem uncalled for, given the importance of public debate, it is not always easy to tell at what point they actually have to be considered illegitimate. We suggest that a distinction should be made according to whether criticism comes from a private source (1) or from members of the legislative or executive power (2). Only in the latter case, a criticism can pose a threat to judicial independence and the separation of powers (2a). Difficult to evaluate are, however, cases where public attacks come from a private source with strong links to the executive, as seems to be the case in Poland (2b.)

1. Criticism from private parties

a) "Scandalizing the Courts"

Criticism coming from a private party, be it an individual or a corporation, must be accepted within the general limits of the freedom of expression such as libel or public order. As equally important foundations of a free and democratic society, the freedom of expression – and of the press for that matter – and the independence and authority of the judiciary cannot be ranked in an inflexible and hierarchical order. Rather, they should carefully be brought to a sufficient balance. This balancing process may start with the assumption that in general, criticism of and even harsh attacks by private persons against the judiciary do not by themselves pose a risk to the rule of law but must, generally, be accepted in a free and democratic society. In the UK for example, this principle was recognised in 2013 when "scandalising the courts" was abolished as a variety of the "contempt of Court" offence. However, the ECtHR that correctly acknowledged in the case of Peruzzi vs. Italy (appl. n° 39294/09) that under very specific circumstances, the interest "to maintain the authority and impartiality of the judiciary" may form one of the aspects that might be able to justify a limitation on the freedom of expression.

b) Duties to react?

Especially in the context of the aforementioned defamation of judges in a national British newspaper the question arises, if members of the other powers, especially the executive (here the Lord Chancellor and the Prime Minister), should be expected to publicly defend the judiciary against attacks, especially coming from the media. While we recognise a duty of the executive to protect the judiciary against safety threats, we do not assume a duty to intercede and become implicated in a public debate in order to protect the rule of law. A timely reaction is certainly desirable. This would not only show the necessary respect for the judiciary, but also an awareness of the fact that judges must remain impartial and therefore cannot engage in public debate like politicians. However, a failure of a politician to adequately react does not, at least not on its own, pose a threat for the separation of powers and judicial independence. What a political failure to react can show – and this is bad enough – is a lack of proper style and understanding for the role of the judiciary.

The judiciary or individual judges cannot respond to such criticism and rebut these assertions as they, generally, only speaks through their judgments. In some countries, it has have been reported (at para 277), the Supreme Court or a National Council for the Judiciary addresses criticism against the Judiciary. In the UK, for example, the then-president of the Supreme Court, Lord Neuberger, commented on the headline "Enemies of the People" in a BBC interview. Within their prerogatives and while strictly observing the limits on public expression their office places on them, especially the highest judges should not shy away from a careful dialogue with the press, possibly through a designated spokesperson or through well dosed and cautious public appearances. This is how the judiciary can build a relationship with the press based on mutual respect for the respective roles of the judiciary and the media in a democratic society to advance the position of the Courts in the public eye. If such a relationship is established, journalists can step up in defence of the judiciary against the media and other branches of government.

2. Criticism from other branches of government

a) Direct attacks

Most problematic are cases in which other branches of government act against the judiciary by means of defamation out of political opportunity or discontent with judicial decisions. These attacks form a whole different level of danger for the independence of the judiciary and the rule of law in general. Attacks coming from members of the executive and legislative, especially if politicians in their official capacities direct their criticisms openly and in an aggressive manner against judges themselves and/or their rulings can amount to a blunt disregard for the basic functions of the rule of law. As the CCJE's Opinion No. 18 (2015) (at para. 36) pointed out, the encouragement of disobedience against judicial decisions and the encouragement of violence against judges is a violation of the independence of judges and a serious threat to the separation of powers. Such cases have been reported (at paras. 275-276) from Ukraine, for example. Public statements indicating a preference for a decision in a particular case can also exert considerable pressure on a particular judge. In such a case, the ECtHR decided in Kinský v. the Czech Republic (application no. 42856/06), that a Court under such pressure did not meet the requirement of an independent court according to Article 6 ECHR. Especially if supreme, constitutional, supra- and international Courts decide politically sensitive matters against the wishes of a political party, only the acceptance and implementation of such rulings acknowledges the fundamental role of the judiciary. As the ECJ's Advocate General Poiares Maduro famously wrote in his opinion in Kadi I (C-402/05 P at para 45): *"[…] the political process [in certain cases] is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few. This is precisely when courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow. Their responsibility is to guarantee that what may be politically expedient at a particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper."* This specific task of the judiciary places boundaries on criticism against the judiciary by other branches of government in that they are limited to discussing the legal merits of a judgement and its implications but may not, in order to preserve the balance between the powers, delegitimize judges and their work through politically motivated statements against the Courts.

b) Indirect attacks

More difficult to evaluate are, however, cases in which public attacks do not come directly from a member of the executive or legislative power but from a private source with questionable independence. This can be the case if former state officials manage a campaign financed by state enterprises, such as seems to be the case in Poland, or where the state media is in effect under the control of the government. In such a situation, the private, unofficial character of the source of the attack is a mere sham and should consequently be subject to a heightened scrutiny. In German public law, the principle is recognized that the state cannot shed off the boundaries of public law, especially of human rights, by acting in the legal form of a company, as was exemplified by the FRAPORT-Judgment of the Federal Constitutional Court in 2011. We do not suggest that it would be wise to draw on this case in detail and the German legal doctrine behind it. However, we think that in a very general way, this principle can be useful in respect to the question at hand. Just as it is not acceptable that state power hides behind a private company it controls, we argue that likewise, the legislative and the executive cannot hide behind the alleged private character of sources which are in fact under their financial and factual control. The more direct and apparent the organizational and content-related influence of government officials is, the more strictly should their potentially undue influence on the judiciary be monitored. In practice, however, establishing whether such strong links actually exist between governmental officials and the private source is a difficult question which needs to be answered in every individual case. For establishing the necessary facts, the help of journalists rather than lawyers will be required.

IV. Conclusion

Anyone who would rather like to have his/her disputes with others or with the state resolved under the law, applied by an independent and impartial judge rather than by virtue of force, should be interested in maintain judicial independence and the rule of law. An alliance of the civil society, legal professionals and journalists

should therefore be vigilant concerning the challenges the rule of law is facing these days in Europe. The framework proposed here might be a useful tool in determining when public criticism of the judiciary may become such a challenge.

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